Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLE

NO. 80-918

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ALLEN R. TRUE, CYNTHIA F. TRUE, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

MICHAEL J. MEEHAN
P. O. Box 2268
Tucson, Arizona 85702
(602) 622-3531
Attorney for Petitioner

FREDERIC A. LUYTIES III
MOLLOY, JONES, DONAHUE, TRACHTA,
CHILDERS & MALLAMO, P.C.
Of Counsel

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QUESTION PRESENTED FOR REVIEW

Whether the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), making appealable certain orders which finally determine claims which are too important to be denied review and too independent of the case itself to require the deferral of appellate consideration, applies to review of cases from the United States Tax Court by the Courts of Appeal.

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OPINION OF THE LOWER COURTS

The Order of the United States Court of Appeals for the Ninth Circuit, No. 80-7098, filed August 15, 1980, is not reported, and is Appendix "A", *infra*. The Order of the Chief Judge of the United States Tax Court dated November 27, 1979, is not reported, and is Appendix "B", *infra*. The Order of the special trial judge in Case No. 13160-78, *et al.*, dated August 27, 1979, is not reported, and is Appendix "C", *infra*.

STATEMENT OF JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit was entered on August 15, 1980. On November 4, 1980, Mr. Justice Rehnquist entered an Order under this Court's No. A-390, extending the time within which to file a Petition for Writ of Certiorari to and including December 5, 1980. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

26 U.S.C. §7482(a) provides:

> "The United States courts of appeal shall have exclusive jurisdiction to review the decisions of the tax court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code."

26 U.S.C. §7459(c) provides:

> "A decision of the Tax Court (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Tax Court. If the Tax Court dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Secretary or his delegate or if the Tax Court dismisses a proceeding for lack of jurisdiction, an order to that

effect shall be entered in the records of the Tax Court, and the decision of the Tax Court shall be held to be rendered upon the date of such entry."

STATEMENT OF THE CASE

Allen R. True and his wife, Cynthia F. True, the Petitioners in this case, are residents of Arizona. In 1971 and 1972, as well as in other years, Allen True obtained the rights to various oil and gas leases commonly known as wildcat leases. The rights to these leases were transferred to the True Oil Company, a partnership owned and operated by Allen True's brother, H. A. True and his wife, Jean D. True. Allen True had paid substantial amounts of money to obtain the rights to these wildcat leases, and received payments from True Oil Company

in return for transferring the rights to the True Oil Company. These payments were advanced royalties,[1] in the form of guaranteed minimum overriding royalties.

This case was begun in the United States Tax Court by a Petition, Tax Court No. 13160-78, by Allen True and his wife for redetermination of deficiencies asserted by the Respondent Commissioner. Companion cases were instituted before the Tax Court pursuant to 26 U.S.C. §6213(a) by H. A. True, his wife and his children and their spouses. The latter

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[1] The statement of the case is taken substantially from the Memoranda of the Government and of Mr. True, filed with the Ninth Circuit in connection with the Government's Motion to Dismiss Mr. True's appeal. Insofar as we can determine, the Government does not now, and did not in the Ninth Circuit, disagree with factual matters in the Memoranda or in the Transcript of proceedings in the Tax Court from which the appeal is taken.

cases[2] are the subject of a Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, No. 80-690, now pending before this Court.

Allen True contended that the payments made by him for the wildcat leases, as to which there is no reasonable expectancy of future revenues, were an offset, as cost depletions, against the selling price of the leases when sold to the True Oil Company. *See, Collums v. United States*, 480 F. Supp. 864 (D. Wyo. 1979). This is an issue that will also affect

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[2] The cases of H. A. True and his children were numbered 13157-78, 13158-78, 13159-78, 13161-78 and 13167-78. Various issues of taxation were raised in the Petitions for Redetermination of Deficiency, including issues of the proper treatment to be given payments by the True Oil Company to the children of H. A. True, not for wildcat leases such as were obtained by Allen True, but for leases obtained at government auction for which only a nominal price was paid.

other tax years for Allen True, and as to which he therefore wants an adjudication.[3]

As an alternative, however, Allen True will argue to the Tax Court that he was acting on behalf of True Oil Company in acquiring the wildcat leases and therefore should not be chargeable with any taxable effects of obtaining wildcat leases and transferring them to True Oil Company. Such a position, however, will prejudice his brother, H. A. True, for if the Government agrees, the effect upon H. A. True will be to disallow deductions that the True Oil Company has taken, properly it asserts, for the royalty payments made to Allen True.

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[3] That such a determination will collaterally estop the Commissioner in future years, so long as the factual and legal basis for the ruling is not changed, is apparent. Commissioner v. Sunnen, 333 U.S. 591 (1948); Jones v. United States, 466 F.2d 131 (10th Cir. 1970); Harvey Coal Corp. v. United States, 35 F. Supp. 756 (Ct. Cl. 1940); Dean v. Commissioner, 56 T.C. 895 (1971).

As to the True Oil Company, the Government contended that the monies Allen True received from the True Oil Company were not deductible in the year paid because they constituted "bonuses" which must be capitalized by True Oil Company. However, H. A. True contends that the payments made were advanced royalties for which deductions are properly claimed, and are not bonuses that are subject to capitalization.

In the Tax Court, the Internal Revenue Service took the alternative position that, if the payments by True Oil Company are not bonuses, they are in any event nondeductible for the Company because there was no arm's length transaction between the True Oil Company and Allen R. True.

The Respondent Commissioner succeeded in convincing the Tax Court that the cases of the H. A. True family, and that

of Allen True and his wife, should be consolidated. The result is virtually certain to be a decision by the Tax Court based upon H. A. True conceding the I.R.S. alternative position, that the True Oil payments to Allen True were not an arm's length transaction, in order to avoid exposing his brother to loss of the cost depletion for the payments made by Allen True in acquiring the leases.

Thus, unless the Order of Consolidation is reviewable upon appeal, the result is an automatic loss by True Oil Company and H. A. True of substantial deductions that might otherwise be claimed for the royalty payments to Allen True, and the loss by Allen True of the right to litigate the validity of the claimed cost depletion deductions against proceeds of the lease sales. By virtue of a supposedly nonappealable order, the Commissioner will have obtained elimination

of one of two otherwise proper deductions[4] and will have avoided a determination on the merits of the cost depletion issue, to boot.

The taxpayers appealed, Allen True to the Ninth Circuit because of his residence in Arizona, H. A. True and his family to the Tenth Circuit because of their residence in Wyoming. In both

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[4] In separate trials, the Government will likely argue in the True Oil Company case that the payments to Allen True were not an arm's length transaction. If True Oil successfully disputes that, and prevails on the advanced royalty theory, its deductions will be sustained. In a separate trial against Allen True, the Government will likely turnabout and argue that Allen True was indeed acting independently, but further, that the cost depletion offsets are not allowable. Such inconsistent treatment for tax purposes of the same item of income or deduction in separate cases, involving separate taxpayers, does occur. Phillips v. Commissioner, 40 T.C. 157 (1963); Harry C. Miller v. United States, 67-2 U.S.T.C. ¶9685 (Ct. Cl. 1967) (not officially reported). Allen True should be able to support his deductions either by the cost depletion theory, or by disputing the "arm's length" contention of the Government, without thereby causing disallowance of deductions for True Oil Company.

instances the Appellants claimed that the Orders of Consolidation, affecting substantially the merits of the action in a way that would become nonreviewable, were appealable under this Court's doctrine first established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Tenth Circuit agreed that the Cohen Doctrine applied, but not to this Order.

Before the Ninth Circuit, the Government argued that 26 U.S.C. §7482(a) vests such a limited jurisdiction in the courts of appeal that the *Cohen* Doctrine does not apply, and that the only orders or decisions of the Tax Court which are appealable are those specifically identified in 26 U.S.C. §7459(c), prescribing the date upon which a decision of the Tax Court is deemed to have been entered. The Ninth Circuit agreed, holding that "the Tax Court's Order here in issue is

not appealable under *Cohen v. Beneficial Industrial Loan Corp. . . .*"

REASONS FOR GRANTING THE WRIT

The courts of appeal are in substantial disagreement about the extent to which decisions or orders of the Tax Court, which conclusively determine various substantive rights, are reviewable if they do not actually take the form of a determination of deficiency, or dismissal. The Government argued below [5] that the kind of "decision" made reviewable in the courts of appeal, by 26 U.S.C. §7482(a), is limited to the definition contained in 26 U.S.C. §7459(c), which specifies that a decision shall be "held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Tax Court . . . [or] dismisses a

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[5] Motion to Dismiss, p. 2.

proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Secretary . . . or . . . dismisses a proceeding for lack of jurisdiction".

This position had been adopted by the Second Circuit in *Michael v. Commissioner*, 56 F.2d 825 (2d Cir. 1932), where the Second Circuit was construing the identical, predecessor provisions to §§7482(a) and 7459(c) of the Internal Revenue Code of 1954. This "date of decision" rule was applied both as to intermediate orders of the Tax Court and as to orders of the Tax Court pertaining to cases within its jurisdiction other than the redetermination of income taxes.

For example, there arose a line of cases from the circuits in the 1940s and early 1950s which held that because of this narrow, "date of decision" rule, the

courts of appeal had no jurisdiction to review Board of Tax Appeals decisions on the renegotiability of certain contracts under the excess war profits statutes of the United States. *E.g., Ceco Steel Products Corp. v. Commissioner of Internal Revenue*, 150 F.2d 698 (8th Cir. 1945); *Kiker v. Commissioner of Internal Revenue*, 218 F.2d 389 (4th Cir. 1955). Thereafter, this Court in *United States v. California Eastern Line*, 348 U.S. 351 (1955), held that 26 U.S.C. §1141, the predecessor of the review statute now in issue, was broad enough to authorize review of such renegotiation orders, and was not intended narrowly to apply simply to review of the kind of decisions described in the "date of decision" statute.

The more expansive interpretation of the review statute, contained in *California Eastern Line, supra*, seems consistent with the legislative history of the

Act, which indicates that Congress, in adopting the "date of decision" definition in what is now 26 U.S.C. §7459(c), was primarily concerned with precisely fixing the date upon which a decision became final in the sense of non-reviewable, in order to terminate the power of the Internal Revenue Service to levy jeopardy assessments, to determine when the jurisdiction of the district courts attached for purposes of refund actions and so forth.[6]

Notwithstanding this Court's evident repudiation of a narrow "date of decision" construction of the review statute, the circuits have subsequently divided on whether or not they may review Tax Court orders which affect substantive rights, and would be reviewable either under the

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[6] S. Rep. No. 52, 69th Cong., 1st Sess. 36 (1926); H. R. Rep. No. 1, 69th Cong., 1st Sess. 19-21 (1926).

Cohen Doctrine, or under a more general application of the law of final judgments.

The Sixth Circuit has expressly rejected the argument which the Commissioner made in this Court, holding in *Louisville Builder Supply Company v. Commissioner of Internal Revenue*, 294 F.2d 333 (6th Cir. 1961), that a Tax Court order for the deposition of a witness in anticipation of deficiency proceedings, even though not a "decision" as defined in 26 U.S.C. §7459(c), nonetheless was reviewable under 26 U.S.C. §7482. Moreover, in *Licovoli v. Commissioner of Internal Revenue*, 318 F.2d 281 (6th Cir. 1963), the Sixth Circuit expressly recognized the applicability of the *Cohen* Doctrine to Tax Court review proceedings, although it refused to consider an appeal from an order that an amended reply be verified, finding it

simply not important enough nor collateral enough to satisfy *Cohen*.

The Seventh Circuit in *Ryan v. Commissioner of Internal Revenue*, 517 F.2d 13 (7th Cir. 1975), and the Tenth Circuit in *Hatten v. Commissioner of Internal Revenue, Appendix D, infra*, recognize the applicability of the *Cohen* Doctrine to Tax Court review, although each opinion concluded that *Cohen* was not satisfied in the case before it.[7] The

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[7] The reason given by the Tenth Circuit for so finding in the case appealed by H. A. True seems itself to be in conflict with other circuits, and erroneous, for the Tenth Circuit said that "orders which merely consolidate cases for trial are not immediately reviewable", a rule which conflicts with the position, at least, of the Second Circuit. In re Master Key Antitrust Litigation, 528 F.2d 5, 13 (2d Cir. 1975), recognizes that where consolidation orders have a serious permanent effect upon substantial rights of the parties, review of which will not survive to appeal of the final judgment, a consolidation order can be appealable. Although this Court will not, of course, be called upon to determine the merits of the consolidation order, we think the Tenth Circuit was mistaken in excluding consolidation orders from the Cohen Doctrine and from excluding this one, in particular.

position of the Tenth Circuit has, previously to the *Hatten* case, Appendix D, been somewhat extreme. In *Estate of Whitlock v. Commissioner*, 547 F.2d 506 (10th Cir. 1977), the Tenth Circuit applied the same rule to refuse appealability even of a Tax Court order which, in effect, reinstated a previous Tax Court order that had been reversed by the Tenth Circuit.

On the other hand, other circuits continue to apply the narrow "date of decision" rule. *Handshoe v. Commissioner of Internal Revenue*, 252 F.2d 328 (4th Cir. 1958) (citing *Kiker v. Commissioner, supra*, notwithstanding the intervening *California Eastern Line* case); *Commissioner v. S. Frieder & Sons Co.*, 228 F.2d 478 (3d Cir. 1955) (the word "decision" has a meaning of art, referring only to two kinds of judicial action by the Tax Court, dismissing the proceeding or

determining a deficiency); *Commissioner v. Smith Paper, Inc.*, 222 F.2d 126 (1st Cir. 1955);[8] *W.W. Windle Co. v. Commissioner*, 550 F.2d 43 (1st Cir. 1977); *Porter v. Commissioner*, 453 F.2d 1231 (5th Cir. 1971) (the word "decision" in §7482(a) "has a meaning of art", it refers "only to two kinds of judicial action by the Tax Court").

Finally, the Ninth Circuit also adopts the position of the Government, that what is reviewable under 26 U.S.C. §7482(a) is determined by the definition of decision contained in 26 U.S.C. §7459(c).

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[8] Smith Paper also holds that the addition in 26 U.S.C. §7482, by 1948 Amendment, of language giving the courts of appeal the power to review decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury" was intended only to eliminate this Court's rule in Dobson v. Commissioner, 320 U.S. 489 (1944), that because of the arcane nature of the tax laws, Tax Court decisions should not be subject to full review on the merits, but should only be reversed if there is no rational basis for the conclusions they reach.

Wilson v. Commissioner, 564 F.2d 1317 (9th Cir. 1977). And, of course, it refused to entertain the instant appeal under the *Cohen* Doctrine.

One respected commentator has noted that the excess profits renegotiation cases "left a certain legacy of confusion over what is an appealable order [from the Tax Court]" which "conceivably may be revived by the 1969 creation of the Tax Court as an Article I Court of Record". But, it was said, "there seems to be no reason to suppose that the courts will not approach §7482(a) with the same flexible attitude that has characterized the interpretation of the term 'final decision' in 28 U.S.C. §1291", 9 Moore's Federal Practice ¶213.03[1.-3], p. 13-22. But, in fact, as the divergent orders of the Tenth and Ninth Circuits in this matter demonstrate, such a flexible approach, applying or analogizing the

Cohen Doctrine, is only being recognized in a few of the circuits.

The decision of the Tax Court sought to be appealed was neither "tentative, informal or incomplete . . . [nor] merely a step toward final disposition of the merits of the case." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974). By the consolidation, the Commissioner virtually prevails in one-half of his case on the deductibility of the royalty payments, a result which goes "beyond the permissible objective of judicial economy to deny a party his due process right to prosecute his own separate and distinct claims or defenses". *In re Master Key Antitrust Litigation*, 528 F.2d 5, 13. If the order of consolidation were conceivably reviewable in the ultimate Tax Court decision, such review would be "too late effectively to review the present order, and the rights conferred . . .

will have been lost, probably irreparably", *Cohen, supra*, 337 U.S. at 546. Petitioner will be deprived of his opportunity to litigate the cost depletion issue as will his brother who also stands to lose the deductibility issue for the reasons stated above.

This Court should grant review and establish whether there is any reason not to give the courts of appeal effective review of any Tax Court decision of such importance and prejudice, and should further decide if there is any reason why the determination contained in 26 U.S.C. §7459(c) of the time that a "decision" is reached, should restrict effective appellate review.

December 5, 1980.

MICHAEL J. MEEHAN

FREDERIC A. LUYTIES III
MOLLOY, JONES, DONAHUE, TRACHTA,
CHILDERS & MALLAMO, P.C.
Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALLEN R. TRUE and CYNTHIA F. TRUE, Petitioners/Appellants, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent/Appellee.	FILED August 15, 1980 RICHARD H. DEANE Clerk U.S. Court of Appeals No. 80-7098 Tax #13160-78 WASHINGTON (ARIZONA) O R D E R

Before: ALARCON and CANBY, Circuit Judges.

Upon due consideration of appellee's motion and the opposition thereto, this appeal is dismissed for lack of jurisdiction. The Tax Court's order here in issue is not appealable under *Cohen v. Beneficial Industrial Corp.* 337 U.S. 541 (1949). Appellants' motion for an extension of time in which to file their brief is denied as moot.

APPENDIX B

UNITED STATES TAX COURT

WASHINGTON, D.C. 20217

DONALD G. HATTEN and TAMMA T. HATTEN, ET AL.,	)	Nos. 13157-78
	)	13158-78
	)	13159-78
	)	13160-78
Petitioner,	)	13161-78
	)	13167-78
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	
	)	

O R D E R

These cases were called from the calendar for the motions session of the Court at Washington, D. C. on March 7, 1979 for hearing on respondent's motions (a) to consolidate the above-captioned cases for trial, briefing, and opinion and (b) to change the place of trial in the case at docket number 13160-78 from Phoenix, Arizona, to Denver, Colorado. A

motion to withdraw filed by petitioners' counsel in the case at docket number 13160-78 was also before the Court and was granted. Counsel for respondent in all the cases and counsel for petitioners in all the cases other than the case at docket number 13160-78 appeared and were heard on respondent's said motions. There was no appearance by or on behalf of petitioners in the case at docket number 13160-78. Statements of new counsel for petitioners in that case, concurring in petitioners' objections to respondent's said motions, were before the Court.

After careful consideration of the contents of respondent's motions, the oral arguments of counsel, the briefs of counsel (concurred in with respect to the brief of counsel for the other petitioners by petitioners' counsel in the case at docket number 13160-78), and the entire

record herein, the Court having determined that all of the above-captioned cases involve common questions of law and fact, that their consolidation will avoid unnecessary costs, delay, and duplication, and that designation of Denver, Colorado, involves as little inconvenience or expense to the taxpayers as is practicable in the circumstances, it is

ORDERED that respondent's motion to consolidate all of the above-captioned cases for trial, briefing, and opinion is granted. It is further

ORDERED that respondent's motion to change the place of trial in the case at docket number 13160-78 is granted and the place of trial of that case is herewith

changed from Phoenix, Arizona, to Denver, Colorado.

(Signed)
Murray H. Falk

Special Trial Judge

Dated: Washington, D. C.
August 27, 1979

APPENDIX C

UNITED STATES TAX COURT

WASHINGTON, D. C. 20217

DONALD G. HATTEN and TAMMA T. HATTEN, ET AL.,	)	Nos. 13157-78
	)	13158-78
	)	13159-78
	)	13160-78
Petitioner,	)	13161-78
	)	13167-78
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	
	)	

O R D E R

On October 12, 1979, petitioners in the cases at docket numbers 13157-78, 13158-78, 13159-78, 13161-78, and 13167-78 filed a document entitled Exceptions to Special Trial Judge's Order which the Court docketed as a motion to vacate our Order herein dated August 27, 1979. These petitioners stated that counsel for petitioners in the case at docket number

13160-78 concur in the exceptions set out therein.

After careful consideration of the contents of said motion and thorough review of the entire record in these cases, it is

ORDERED that petitioners' exceptions are denied and the Order of the Special Trial Judge entered August 27, 1979, is in all respects ratified and confirmed, provided, however, that nothing in this Order or in the said Order of the Special Trial Judge shall be construed to deny to the division of the Court to which these consolidated cases shall be assigned for trial the right under Rule 141(a), Tax Court Rules of Practice and Procedure, upon motion made after said assignment, to order that a portion of the proceedings be held at Phoenix, Arizona, if it then appears to said division that unnecessary

costs or delay or duplication may thereby be avoided.

(Signed) C. Moxley Featherston

Judge

Dated: Washington, D. C.
November 27, 1979

APPENDIX D

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DONALD G. HATTEN and TAMMA T. HATTEN, H. A. TRUE, JR. and JEAN D. TRUE, HENRY A. TRUE, III, and KAREN S. TRUE, DAVID L. TRUE and MELANIE A. TRUE, DIEMER D. TRUE, III, and SUSAN L. TRUE, Petitioners-Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	FILED United States Court of Appeals Tenth Circuit JULY 25, 1980 HOWARD K. PHILLIPS Clerk No. 80-1250

Appeals from the
United States Tax Court
(Docket Nos. 13157-78; 13158-78;
13159-78; 13161-78; 13167-78

Submitted on the briefs pursuant to Tenth Circuit Rule 9.

Before BARRETT, McKAY, and LOGAN, Circuit Judges.

PER CURIAM

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

This is an appeal from an order of the United States Tax Court which directed consolidation of six closely-related cases in that court for purposes of briefing, trial and disposition.

Appellee, by appropriate motion, now challenges our jurisdiction to entertain the appeal.

Appellants are members of the same family who reside at Casper, Wyoming. In the five cases involved here, appellants petitioned the Tax Court for redetermination of their respective income tax liabilities for certain tax years. The Commissioner answered the petitions and sought the consolidation of these cases with that of another family member who resides at Phoenix, Arizona. In support of his motion for consolidation, the Commissioner asserted that the cases involved common questions of law and fact and that trial time would be substantially reduced by consolidation. Over the objection of all petitioners, and after a full hearing, the Tax Court ordered the requested consolidation. From that order, the Wyoming petitioners have appealed to this court. We are advised that the Arizona petitioner has taken a similar appeal from the same order to the

United States Court of Appeals for the Ninth Circuit.

The threshold question is whether the Tax Court's consolidation order is immediately reviewable. We conclude that it is not and must therefore dismiss for lack of appellate jurisdiction.

Courts of appeal have jurisdiction to review decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 26 U.S.C. §7482. Only final decisions of district courts are reviewable as a matter of right under 28 U.S.C. §1291. Thus, for a Tax Court's decision to be reviewable, it must be final. *Estate of Whitlock v. Commissioner*, 547 F.2d 506, 509 (10th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977).

It has long been the rule in this circuit that orders which merely consoli-

date cases for trial are not immediately reviewable. *Skirvin v. Mesta*, 141 F.2d 668 (10th Cir. 1944). *In Re Master Key Antitrust Litigation*, 528 F.2d 5, 13-14 (2nd Cir. 1975); *NAACP v. Michot*, 480 F.2d 547, 548 (5th Cir. 1973). *Cf. Helene Curtis Industries, Inc. v. Church & Dwight Co., Inc.*, 560 F.2d 1325 (7th Cir. 1977), *cert. denied*, 434 U.S. 1070 (1978).

Appellants candidly recognize the interlocutory nature of the challenged order, but insist nevertheless that it is immediately reviewable as a collateral order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In order to bring the Tax Court's order within the collateral order doctrine, appellants argue that because they and their Arizona co-petitioner are differently situated, different issues will be important to the ultimate determination of

their respective tax liabilities. They also say that positions of individual petitioners on some of these issues may be antagonistic.

In both *Cohen* and the later case of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Supreme Court has made it clear that the loss of an important right is an ingredient essential to the application of the doctrine to an otherwise unappealable order. The *Cohen* exception to the final judgment rule is a narrow one and is to be applied only in the "plainest cases of prejudice." *In Re Master Key Antitrust Litigation, supra* at p. 13. We are unpersuaded that consolidation of the related cases will confuse any issues presented to the Tax Court or their varying application to the other petitioners. In sum, there has been no proper showing of exceptional circumstances sufficient to authorize an interlocutory

appeal under *Cohen*. *Paramount Film Distributing Corp. v. Civic Center Theater, Inc.*, 333 F.2d 358 (10th Cir. 1964). *See also, Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977).

Appeal dismissed.

No. 80-918

JAN 13 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

ALLEN R. TRUE AND CYNTHIA F. TRUE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners seek review of an order of the United States Tax Court consolidating their case for trial with the cases of other similarly situated participants in the transaction giving rise to one of the issues in litigation. The court of appeals dismissed their appeal for lack of jurisdiction. The same issue is presented in *Hatten* v. *Commissioner*, cert. denied, No. 80-690 (Jan. 12, 1981).

The court of appeals correctly dismissed petitioners' appeal. The jurisdiction of the courts of appeals to review actions of the Tax Court is strictly limited by statute. Section 7482(a) of the Internal Revenue Code of 1954 (26 U.S.C.) grants to the courts of appeals jurisdiction "to review the decisions of the Tax Court," and Section 7459(c) (26 U.S.C.) establishes the content of the term "decision" as "an order specifying the amount of the deficiency." As the Second Circuit held almost 50 years ago in *Michael* v.

Commissioner, 56 F. 2d 825 (1932), under parallel provisions then relating to the Board of Tax Appeals, the court of appeals have jurisdiction to review only such "decisions" of the Tax Court (then the Board of Tax Appeals), and not intermediate or interlocutory orders.[1]

Contrary to petitioners' contention (Pet. 14-15), the courts of appeals have uniformly followed *Michael,* and have held that the courts of appeals have jurisdiction to review on appeal only those "decisions" of the Tax Court (or its statutory predecessor, the Board of Tax Appeals) that determine the amount of a deficiency, or that, by statute, are considered to be such decisions. *Wilson* v. *Commissioner,* 564 F. 2d 1317, 1318 (9th Cir. 1977). See also *Ceco Steel Products Corp.* v. *Commissioner,* 150 F. 2d 698 (8th Cir. 1945); *Kiker* v. *Commissioner,* 218 F. 2d 389 (4th Cir. 1955); *Commissioner* v. *Smith Paper,* 222 F. 2d 126 (1st Cir. 1955); *Commissioner* v. *S. Frieder & Sons Co.,* 228 F. 2d 478 (3d Cir. 1955); *Handshoe* v. *Commissioner,* 252 F. 2d 328 (4th Cir. 1958); *Licavoli* v. *Commissioner,* 318 F. 2d 281 (6th Cir. 1963); *Porter* v. *Commissioner,* 453 F. 2d 1231 (5th Cir. 1972); *Ryan* v. *Commissioner,* 517 F. 2d 13 (7th Cir.), cert. denied, 423 U.S. 892 (1975);

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[1]The 1954 Code expressly assimilates certain other dispositions of proceedings by the Tax Court as "decisions" for purposes of Section 7482(a). Section 7459(d) provides that a decision dismissing a proceeding shall be considered a decision that the deficiency is the amount determined by the Secretary, and Section 7459(e) provides that if assessment or collection is barred by the statute of limitations, a decision of the Tax Court to that effect shall be considered a decision that there is no deficiency. More recently, when the Tax Court was given limited jurisdiction to make declarations with respect to charitable organizations (Section 7428), certain retirement plans (Section 7476), transfers of property from the United States (Section 7477), and the status of certain governmental obligations (Section 7478 (Supp. II)), Congress has carefully provided that such a declaration shall have the force and effect of a decision of the Tax Court, "and shall be reviewable as such." See Sections 7428(a), 7476(a), 7477(a), and 7478(a) (Supp. II).

W. W. Windle Co. v. *Commissioner,* 550 F. 2d 43, 45 (1st Cir.), cert. denied, 431 U.S. 966 (1977); 9 J. Mertens, *Law of Federal Income Taxation* § 51.13 (1977).[2] Since the consolidation order does not determine the amount of the deficiency, the court properly dismissed petitioners' appeal for lack of jurisdiction.

In seeking to avoid the limitations upon review of Tax Court orders other than decisions, petitioners attempt to invoke (Pet. 19-21) the "collateral order" doctrine of *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541 (1949). *Cohen* and the "collateral order" doctrine have no relevance in this context. The question in *Cohen* related to the finality, for purposes of 28 U.S.C. 1291, of the order in question. But, as the court noted in *Michael* v. *Commissioner, supra,* 56 F. 2d at 826, the first question with respect to an appeal from an order of the Tax Court is whether the order under review is a "decision" of the Tax Court, not whether it is final. Here, the consolidation order was not a decision. Hence, appeal from that order is not within the jurisdiction conferred upon the courts of appeals by Section 7482(a) of the Code.

Even if the question in this case were confined to finality, the "collateral order" doctrine of *Cohen* would not support

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[2]The phrase in Section 7482(a) assimilating review of Tax Court decisions to review of district court decisions relates to scope of review, not to jurisdiction. *Commissioner* v. *Smith Paper, supra,* 222 F. 2d at 128.

Petitioners contend (Pet. 15) that *Louisville Builders Supply Co.* v. *Commissioner,* 294 F. 2d 333 (6th Cir. 1961), deviates from this consistent line of authority. But that case involved a special proceeding that the court of appeals held was beyond the jurisdiction of the Tax Court, and was therefore reviewable on that basis. In a subsequent case, the Sixth Circuit adhered to the well-settled line of authority limiting the jurisdiction of the courts of appeals to review decisions of the Tax Court. See *Licavoli* v. *Commissioner, supra,* 318 F. 2d at 281. See also *W. W. Windle Co.* v. *Commissioner, supra,* 550 F. 2d at 45, n. 1.

petitioners' appeal in this case. As the Court recently observed in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978):

> To come within the "small class" of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

While petitioners contend (Pet. 4-9) that they will suffer injury from the Tax Court's consolidation order, they are free to pursue an appeal from any decision of the Tax Court entered after trial.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1981

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[3]Contrary to petitioners' contention (Pet. 15-16), neither the Seventh Circuit (*Ryan* v. *Commissioner, supra*) the Sixth Circuit (*Licavoli* v. *Commissioner, supra*), the Tenth Circuit (*Hatten* v. *Commissioner, supra*), have applied the "collateral order" doctrine to orders of the Tax Court. While those courts have discussed the doctrine, none of them has found it to be applicable to orders of the Tax Court.

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NO. 80-918

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ALLEN R. TRUE, CYNTHIA F. TRUE, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ON WRIT OF CERTIORARI TO
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FOR THE NINTH CIRCUIT

REPLY MEMORANDUM ON CERTIORARI

MICHAEL J. MEEHAN
P. O. Box 2268
Tucson, Arizona 85702
(602) 622-3531
Attorney for Petitioner

FREDERIC A. LUYTIES III
MOLLOY, JONES, DONAHUE, TRACHTA,
CHILDERS & MALLAMO, P.C.
Of Counsel

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(602) 622-3531
Attorney for Petitioner

FREDERIC A. LUYTIES III
MOLLOY, JONES, DONAHUE, TRACHTA,
CHILDERS & MALLAMO, P.C.
Of Counsel

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REPLY MEMORANDUM ON CERTIORARI

As he did in the court below, the Commissioner urges a very limited and technical restriction of what cases, even final cases, may be appealed from the Tax Court to the courts of appeal. He cites on page 2 a supposed seamless web of opinions said to uniformly support the

proposition that only cases "that determine the amount of a deficiency, or that, by statute, are considered to be such decisions" are reviewable by the courts of appeal. This position is one from which the Commissioner himself has found deviation necessary from time to time. Two of those instances involved cases cited in his memorandum, page 2.

In *Commissioner v. Smith Paper, Inc.*, 222 F.2d 126 (1st Cir. 1955), and *Commissioner v. S. Frieder & Sons Co.*, 228 F.2d 478 (3d Cir. 1955), the Commissioner sought review from the First and Third Circuits, respectively, of Tax Court orders striking an amended answer of the Commissioner which sought to redetermine excess profits tax liabilities. The First Circuit then agreed with the Commissioner's present position that it could only hear appeals of a "decision" as defined by the statute. On the other hand, the Third

Circuit, in *Frieder*, held that the order was analogous to a Tax Court order dismissing a taxpayer's petition challenging a deficiency claim and, therefore, found it to be appealable. *Frieder*, then, disagrees with the position now espoused by the Commissioner to oppose a taxpayer's appeal.

In two other respects, the law is neither as uniform nor as supportive of the Government's position as it would have this Court believe.

As noted in the Petition, page 13, this Court in *United States v. California Eastern Line*, 348 U.S. 351 (1955), held in certain war profit renegotiation situations that Tax Court orders, other than actual determinations of deficiencies, were reviewable in the courts of appeal. That case thus superseded two of those cases cited by the Government on page 2: *Ceco Steel Products Corp. v. Commissioner*,

150 F.2d 698 (8th Cir. 1945), and *Kiker v. Commissioner*, 218 F.2d 389 (4th Cir. 1955).

Three other cases among those on page 2,[1] in fact, do recognize that the determining question is not whether the decision from which review is sought is a "decision" under the "date of decision" or "determination of deficiency" theories espoused by the Commissioner but, rather, whether the decision is "final", either totally or under the *Cohen*[2] doctrine.

There is a conflict between cases like *Licavoli*,[3] *Louisville Builders*,[4] and

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1 Licavoli v. Commissioner, 318 F.2d 281 (6th Cir. 1963); Porter v. Commissioner, 453 F.2d 1231 (5th Cir. 1972); Ryan v. Commissioner, 517 F.2d 13 (7th Cir. 1975).

2 Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949).

3 Supra, Note 1.

4 Louisville Builders Supply Co. v. Commissioner, 294 F.2d 333 (6th Cir. 1961).

Ryan,[5] which recognize the *Cohen* doctrine, either expressly or implicitly do so by applying its principles; and those that do not. It cannot be ignored simply by discussing *Louisville* in a footnote and arguing it as a "spotted dog" case with unique facts. Similarly, the fact that several circuits have accepted the applicability of the *Cohen* doctrine in determining the appealability of Tax Court cases cannot be obviated by contending in a footnote (page 4) that, because they did not hold orders appealable under *Cohen*, those circuits rejected the *Cohen* doctrine for Tax Court cases. It does mean that not every claim to appealability under *Cohen* will be accepted, an approach which is consistent with the cautionary teachings of this Court in *Cohen* cases. But the Ninth Circuit refused to even measure

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[5] Supra, Note 1.

this order, and the collateral prejudice to the Petitioner which was urged as the reason for its appealability, against the standards of *Cohen*.[6]

The Government's view of the scope of review of Tax Court orders has evoked both uncertainty and extreme results. It has resulted in the Tenth Circuit concluding that a Tax Court order, which refused to enforce an earlier mandate of the Tenth Circuit, simply was not appealable. *Whitlock v. Commissioner*, 547 F.2d 506 (10th Cir. 1976). It has evoked inconsistent results, based upon tortuous

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[6] The Government's cavalier assertion, page 4, that in any event this order would not be appealable under Cohen not only overlooks the severe prejudice to Petitioner of pitting brother against brother, thereby causing loss of right to determine deductibility of certain payments, it is beyond the scope of this Petition. We ask the Court simply to order the Ninth Circuit to consider the appealability of this order under Cohen or related principles of finality; we are not asking that this Court, in fact, weigh the appealability of this case under Cohen.

comparisons to "analogous orders" in the *Smith Paper* and *S. Frieder & Sons Co.* cases, *supra*, page 2. It has relegated the review of an order to take a deposition, which clearly exceeded the jurisdiction of the Tax Court, as some kind of *sui generis* exception to the general rule of nonappealability. And, necessarily, the litigation of such ad hoc exceptions to general rules, sometimes by the Government to suit its needs, obviously encourages more attempts to appeal various kinds of Tax Court orders.

This Court ought to express, clearly, the appropriate rule. Either Tax Court orders are appealable if "final", including the collateral final order doctrine, or they are to be limited as the Government now requests. If the former, an extensive body of case law on finality will be available to aid the courts of appeal and to guide counsel whether to

appeal or not. If the latter, the rule is clear (although unworkable, even for the Government). We submit that a summary decision would be appropriate for this Court to settle the conflicting cases on the subject.

February 1981.

MICHAEL J. MEEHAN

FREDERIC A. LUYTIES III
MOLLOY, JONES, DONAHUE, TRACHTA,
CHILDERS & MALLAMO, P.C.
Of Counsel